

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

**ORIGINAL**

Before The Honorable YVONNE GONZALEZ ROGERS, Judge

Lunell Gamble, and Sheila )  
Kenned, on behalf of )  
themselves as well as a class) )  
of similarly situated )  
individuals, )

Plaintiffs, )

vs. )

KAISER FOUNDATION HEALTH )  
PLAN, INC.; KAISER FOUNDATION) )  
HOSPITALS, INC.; and THE )  
PERMANENTE MEDICAL GROUP; )  
all doing business as KAISER )  
PERMANENTE MEDICAL CARE )  
PROGRAM, )

Defendants. )

**Motion to Dismiss  
Case Management  
Conference**

NO. C 17-06621YGR

Pages 1 - 37

Oakland, California  
Monday, April 22, 2019

**REPORTER'S TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

For Plaintiffs: Law Office of Jeremy Friedman  
2801 Sylhowe Road  
Oakland, California 94602  
BY: JEREMY L. FRIEDMAN, ATTORNEY AT LAW

For Defendants: GBG LLP  
633 West 5th Street, Suite 3330  
Los Angeles, CA 90071  
BY: AMANDA BOLLIGER,  
HEATHER A. MORGAN, ATTORNEYS AT LAW

Reported By: Raynee H. Mercado, CSR No. 8258

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Monday, April 22, 2019

2:04 p.m.

P R O C E E D I N G S

**THE CLERK:** Calling civil action 17-6621, Lunell Gamble versus Kaiser Foundation Health Plan.

Counsel, please come forward and state your appearances.

**MR. FRIEDMAN:** Good afternoon, Your Honor. Jeremy Friedman for the plaintiffs.

**THE COURT:** Good afternoon.

**MS. BOLLIGER:** Good afternoon, Your Honor. Amanda Bolliger for the defendants.

**MS. MORGAN:** And Heather Morgan for the defendants.

**THE COURT:** I had Claire Hoffman.

**MS. BOLLIGER:** Ms. Hoffman is no longer with our firm, Your Honor. But Ms. Morgan should be on our caption as well. Ms. Morgan and myself, Ms. Bolliger.

**THE COURT:** Okay.

All right. So if you'll submit a notice so that we can take her off.

**MS. BOLLIGER:** Of course, Your Honor.

**THE COURT:** Thank you.

All right. We're going to do a number of things today. First, with respect to the outstanding motion, the motion is granted. And in the first instance, I previously struck a number of allegations in the third amended -- which remain in the third amended complaint. And I can appreciate that you

1 put disclaimer language in there, but the issue is preserved  
2 for appeal. You don't need to put disclaimer language in  
3 there. And it implicates issues when I get to summary  
4 judgment or later in proceedings. So you're ordered, to the  
5 extent you don't recognize that, to strike them and take them  
6 out. The issue remains preserved.

7 So you are directed to omit from the next complaint  
8 paragraphs 51, 53, and from paragraph 59, the section -- or  
9 the -- the phrase -- paragraph -- or actually, I guess it  
10 should be -- it a paragraph, but it should be may be a statute  
11 section 1981 from lines 7 and 8. And then from paragraph 60,  
12 quote, and section 1981, closed quote, lines 10 and 11.

13 Next, despite the revised allegations, I still believe  
14 that the settlement tactics claim is precluded by the  
15 Noerr-Pennington doctrine. For that proposition, I rely on  
16 Nunag, which is N-u-n-a-g, dash, Tanedo, T-a-n-e-d-o, versus  
17 East Baton Rouge Parochial School Board, 711 F3d. 1136 at  
18 1138, 39. It's a Ninth Circuit case, 2013.

19 The doctrine -- this Noerr-Pennington doctrine was  
20 developed to prevent claims based upon the First Amendment  
21 protection petitioning activity, as well as conduct, quote,  
22 incidental to the prosecution of the suit, closed quotes,  
23 unless such activity is a sham.

24 For this proposition, I rely on *Theofel*, T-h-e-o-f-e-l,  
25 versus *Farey-Jones*, F-a-r-e-y, dash, Jones, 359 F3d. 1066 at

1 1071, Ninth Circuit 2004; and *Kearney vs. Foley & Lardner,*  
2 *LLP*, 590 F3d. 638, jump cite 634, Ninth Circuit case, 2009.

3 As I previously noted in dismissing the claims in the  
4 second amended complaint, the Ninth Circuit has held that the  
5 doctrine bars claims based upon decisions to accept or reject  
6 a settlement, settlement demands and discovery misconduct.

7 Again, more authority, *Freeman vs. Lasky, Haas & Cohler,*  
8 *C-o-h-l-e-r*, 410 F3d., 1180 at 1184-85, Ninth Circuit case,  
9 2005; *Sosa vs. DIRECTTV, Inc.*, 437 F3d. 923 at 942, Ninth  
10 Circuit, 2006; *Columbia Pictures Industries, Inc. vs.*  
11 *Professional Real Estate Investors, Inc.*, 944, F2d. 1525 at  
12 1528, Ninth Circuit case, 1991, which quotes and is affirmed  
13 in a Supreme Court case but, effectively, the important quote  
14 is that a decision to accept or reject an offer of settlement  
15 is conduct incidental to the prosecution of the suit.

16 Accordingly, that kind of activity falls under  
17 Noerr-Pennington, and there can be no liability.

18 In order -- as I indicated in the last order, in order to  
19 fall within the limited exception, you would have to allege  
20 that the activity was for an objectively baseless undertaking  
21 and undertaken for an unlawful purpose.

22 The plaintiffs amended their allegations in paragraphs  
23 22(a) through (c) and paragraph 40 and claim that Kaiser uses  
24 settlement tactics to perpetuate discrimination and  
25 retaliation. However, the court finds that these are, again,

1 conclusory and without any specific facts alleged to support  
2 them.

3 Now, the parties agree about the pleading standard  
4 applicable to sham litigation exceptions. And it appears that  
5 the Ninth Circuit has not yet been as clear on the topic as it  
6 could be. I wouldn't call it a split because -- I would say  
7 there's a conflict. And each of you focus on the case law  
8 that supports your view.

9 So when I looked at *Empress Liability -- Limited Liability*  
10 *Company vs. County and City of San Francisco*, 419 F3d. 1052,  
11 Ninth Circuit case, 2005, relied on by the plaintiffs, there  
12 was no heightened pleading standard articulated in that case.

13 However, in the cases which have followed, namely, *Kearney*  
14 and -- *vs. Foley & Lardner*, previously cited, and that case  
15 also cited back to both *Boone vs. Redevelopment Agency* and  
16 also *Empress* and indicated that there was a heightened  
17 standard. Given the nature of the claim, it seems to me more  
18 consistent to find that the heightened standard applies,  
19 although I don't think that I need to do it here as there  
20 still isn't sufficient factual content.

21 But *Kearney* did not explicitly overrule *Empress*. It just  
22 found opposite of *Empress* without explicitly overruling it.  
23 So if this ever get to the Ninth Circuit, perhaps they can  
24 clarify that standard for the rest of us down here.

25 In any event, as I said, the motion is granted, and so the

1 fifth cause of action is -- is stricken and dismissed and the  
2 additional paragraphs 22 and its subparts and -- what else is  
3 left? Think I've struck everything else.

4 So --

5 **MR. FRIEDMAN:** Can I --

6 **THE COURT:** Go ahead.

7 **MR. FRIEDMAN:** Question of clarification, Your Honor?

8 **THE COURT:** Yes.

9 **MR. FRIEDMAN:** Not to argue the merits of the motion,  
10 but the decision to strike the paragraphs even if it doesn't  
11 support a claim, the cases that we cited in the motion show  
12 that these allegations, even if they don't support a claim  
13 under Noerr-Pennington, still are relevant for various  
14 purposes, so we'd ask that you not strike those paragraphs but  
15 you simply dismiss the fifth cause of action.

16 **THE COURT:** Denied. We aren't going to have them in  
17 there. We aren't going to re-litigate these issues. There's  
18 no need to have them there.

19 If we hadn't had motion practice, fine. But they will  
20 confuse the issues and they suggest a wrongdoing. And I can  
21 understand your frustration, but the law doesn't support your  
22 view, so I think that in light of that, they should be  
23 stricken.

24 **MR. FRIEDMAN:** The issue wasn't so much that -- that  
25 we're trying to make the wrongdoing part of our case. It's

1 just that the testimony that we're intending to elicit on how  
2 Kaiser demands confidentiality and how it -- and how it  
3 hire -- how it insists on no rehire designations are both  
4 facts that support the underlying claim of discrimination. So  
5 even if we're not allowed to sue on the basis of -- of a claim  
6 that's based on those facts, those facts are still relevant to  
7 the question of discriminatory intent --

8 **THE COURT:** Well, I'm not --

9 **MR. FRIEDMAN:** -- relevant to retaliation.

10 **THE COURT:** I'm not sure that they are. So at this  
11 juncture, strike them. Your request is denied. And I don't  
12 want to see them in the fourth amended complaint.

13 But let's talk about where this case is going.

14 **MS. BOLLIGER:** Your Honor, if I may, just for  
15 clarification, there were a couple of other paragraphs that we  
16 listed in -- among those to be stricken pursuant to the  
17 Noerr-Pennington doctrine, so I just wanted to be clear on the  
18 record. I -- I have the complete list if you'd like me to  
19 read them.

20 **THE COURT:** Well, I have -- so I have -- the fifth  
21 cause of action.

22 **MS. BOLLIGER:** Yes.

23 **THE COURT:** In its entirety.

24 **MS. BOLLIGER:** Right.

25 **THE COURT:** Paragraph 22 and its subparts.

1 MS. BOLLIGER: Yes.

2 THE COURT: Paragraph 40 --

3 MS. BOLLIGER: Yes.

4 THE COURT: -- in case that wasn't listed.

5 Paragraph 51 was already stricken.

6 MS. BOLLIGER: Correct.

7 THE COURT: Paragraph 53 --

8 MS. BOLLIGER: Yes.

9 THE COURT: -- was already stricken.

10 And then 59 and 60 were already stricken, so what is left?

11 MS. BOLLIGER: Just paragraph 90, Your Honor, was the  
12 only last one.

13 MR. FRIEDMAN: That's in claim five.

14 MS. BOLLIGER: Oh, my mistake then.

15 THE COURT: All right.

16 So, Mr. Friedman, I have to tell you, I've spent now time  
17 with your case and your complaint and last fall, tried a  
18 Teamsters case. Not done very often these days.

19 In fact, we look nationwide when we were doing jury  
20 instructions and found not even a handful that had been tried.  
21 So when litigators bring cases, they really -- they seek to  
22 litigate. I remember. I was there.

23 As a trial judge, I look at cases and I try to figure out  
24 what am I going to try. That's what I do. I have to tell  
25 you, I don't know how you are going to try this case. And I



1 don't know how you are even going to certify a class given  
2 *Dukes vs. Wal-Mart*.

3 I say that not to dissuade you, 'cause I know I won't, and  
4 I'm not -- and I'm not prejudging. I'm just -- I'm just not  
5 sure in light of what I see how it is you're ever going to get  
6 there.

7 So I want to talk in terms of a case schedule about the  
8 following: And that is these days, we would typically not do  
9 class certification until much later in the process because  
10 there has to be some measure of merits analysis; although,  
11 again, we get conflicting cues from the -- from the higher  
12 courts about how much merits analysis we can really do versus  
13 not.

14 But as a plaintiffs' lawyer, I know that you're spending a  
15 lot of time and effort into these kinds of cases, and my view  
16 is that, in general, plaintiffs' lawyers should know sooner  
17 rather than later if it's not going to work.

18 And you may disagree with me, but you can always take it  
19 to the Ninth Circuit without having incurred the -- the level  
20 of expense necessary to get to that stage. And so I'm curious  
21 whether in this case, things should be bifurcated so that you  
22 can see whether or not you can actually certify a class that  
23 makes -- or warrants the time and effort that you're going to  
24 put into it before you go down that path.

25 **MR. FRIEDMAN:** I appreciate that, Your Honor. I

1 think, though, that the -- the merits are intertwined with the  
2 class certification. And I don't see -- my plan, at least on  
3 how to approach this case, was not to just focus on class  
4 certification issues. In fact, I think the class  
5 certification issues come out of broader questions about the  
6 liability.

7 What the plaintiffs understand and what I know to be the  
8 case is that Kaiser has a serious problem with race  
9 discrimination on a statistical basis, that they know about it  
10 because as an large employer, they're required to report to  
11 the EEOC. As a federal contractor, they're required to  
12 self-audit and report to the Office of Federal Contract  
13 Compliance.

14 **THE COURT:** So you do have some measure of  
15 statistical analysis.

16 **MR. FRIEDMAN:** Oh, yes, in the prior -- in the prior  
17 class action case, we found statistical data that showed  
18 discrimination. And -- and it's -- it's not only just that  
19 those -- that data that we got in the prior case. It's the  
20 fact that Kaiser has complaint after complaint, investigation  
21 after investigation, and they never find that there (sic) had  
22 any discrimination at all.

23 And what they do is they fight every case until it gets to  
24 a point where -- every individual plaintiff is isolated, and  
25 they say, well, this is just one isolated thing. You have to

1 look at one -- one supervisor, one manager, one department.

2 And, in fact, what happens is that racism is a real  
3 problem in our society. I know -- I'm not lecturing to you or  
4 at least I'm not trying to. We all know it to be the case.  
5 And Kaiser has that problem. Kaiser's the largest employer of  
6 African Americans in Northern California.

7 And I heard one academic say, you're -- there's no such  
8 thing as "I'm not a racist." You're either a anti-racist or  
9 you're part of the problem. And Kaiser does not take the  
10 steps that it has to do to investigate complaints of  
11 discrimination. And what they do is they put forth a  
12 narrative that -- that everything is little isolated.

13 So the purpose of this class action is to get beyond  
14 their -- their strategy of just attacking and isolating each  
15 individual claim. Everybody should benefit from knowing how  
16 Kaiser approaches these discrimination cases.

17 If it was a plaintiff who had sued employer after employer  
18 after employer for discrimination, you bet Kaiser would want  
19 to know the facts of those claims, how they ended up, what  
20 happened to them.

21 It's the same thing here. Kaiser's credibility, when it  
22 stands up and says, "we're not a racist; we don't  
23 discriminate," that needs to be evaluated in the context of  
24 what they know in terms of their own discriminatory practices.

25 So I wasn't so interested in just reaching class

1 certification. In fact, what I really wanted to do was to  
2 investigate this pattern-and-practice evidence and to look  
3 into what Kaiser already knows in terms of its own  
4 discriminatory practices and its own failure to undertake the  
5 affirmative actions that it's supposed to do and from that,  
6 make a decision about whether class certification is  
7 necessary.

8 And if not, it would still be something that the  
9 plaintiffs would -- would plead and would be able to use that  
10 pattern and practice as part of their case. And there's Ninth  
11 Circuit authority on that, that you if you bring a case as a  
12 class action -- first of all, there's Ninth Circuit authority  
13 saying in individual cases, you can assert pattern and  
14 practice, even in an individual case.

15 But there's -- there's controversy over that. Kaiser  
16 cites cases from other jurisdictions that say, no, it has to  
17 be a class action in order to be a pattern and practice, the  
18 Teamsters presumption.

19 But in this case, Your Honor, there is a Ninth Circuit  
20 decision directly on point that says, when there was a --  
21 brought as a class but no class certification motion brought  
22 or it was denied -- I can't remember which one -- that the  
23 individual named plaintiffs could still bring forth a  
24 pattern-and-practice case to get that *Teamsters* presumption.  
25 And the *Teamsters* presumption is not a big burden. All it

1 does is it says there's a rebuttable presumption that if an  
2 adverse employment action -- if you were fired -- if you were  
3 African American and you were fired or denied a promotion,  
4 that it has to be justified, and that the burden is on the --  
5 the employer.

6 In -- in a pattern-and-practice case, you prove that  
7 that's their mode of business. The burden is on Kaiser to  
8 prove that there's a basis for it. All it does is it reverses  
9 that at will doctrine that -- that applies because Kaiser's a  
10 big employer. It discriminates as a statistical matter. It  
11 has to know what it does and what it doesn't, and so it's not  
12 that big of a burden for them to be able to take on the burden  
13 of proof on the reasons for the termination.

14 **THE COURT:** Well, in terms of burden-shifting, just  
15 so that you all know, and you should have my perspective given  
16 that this is the nature of this case, the way in which I tried  
17 that Teamsters case last fall, I believe that for jurors to  
18 adequately do their job, they can't be confused, and  
19 burden-shifting is confusing for jurors.

20 So if you look at that docket, *Slaight vs. Tata*  
21 *Consultancy*. This was a reverse discrimination case. Docket  
22 is 15-1696, I went through the *Teamsters* analysis, and even  
23 though we didn't get through it all because the jury came back  
24 in phase one with a defense verdict, I posted on the docket,  
25 agreed-upon jury instructions for all of the burden-shifting

1 that happened in that case. And it's not, obviously, the same  
2 case as this. There wasn't a disparate impact claim. It was  
3 only treatment.

4 So like I said, not exactly the same, but you'll get a  
5 sense of my view in terms of how that works in terms of burden  
6 shifting. So it's there for your edification.

7 **MR. FRIEDMAN:** Thank you, Your Honor.

8 **MS. BOLLIGER:** Thank you, Your Honor.

9 And I just want to point out that defendants, of course,  
10 categorically disagree with plaintiffs' view of defendant's  
11 operations, their investigation practices. And I would just  
12 point out that the *Hill* -- the *Hill* matter that I believe  
13 plaintiff counsel is referencing far from establishing  
14 class-wide discrimination, the parties reached a settlement in  
15 that case that dismissed those class claims without prejudice  
16 and it was just an individual settlement, so we think that  
17 that undermines plaintiffs' counsel's position that there was  
18 some class discrimination being demonstrated out of that  
19 discovery.

20 Defendants also have many investigation procedures and  
21 protocols in place to address internal complaints, and we just  
22 disagree with plaintiffs' counsel's representations.

23 **THE COURT:** Well, that's fine. I never assume that  
24 you agree. If you did, you would have solved that case before  
25 you came into my courtroom.

1           **MS. BOLLIGER:** Thank you, Your Honor. I just needed  
2 to make my record.

3           **THE COURT:** Okay. So you need dates. Let me say  
4 again -- well, I don't know if I've said it again in this -- I  
5 don't know if "again" is the right word. I'm not sure I've  
6 said it in this case, but I've said it every time a defendant  
7 puts in their CMC statements that they reserve the right to  
8 file multiple summary judgments. That is denied. You cannot  
9 reserve what you do not have, and the federal rules allow you  
10 a motion. And I do not allow more than one.

11           That doesn't mean that I haven't on occasion allowed a  
12 defendant to bring more than one. You need to ask, and you  
13 should not presume, nor should you seek to reserve what you do  
14 not have. And you do not have more than one.

15           Is that clear?

16           **MS. BOLLIGER:** Yes, Your Honor.

17           **THE COURT:** So you can't agree on a date for  
18 disclosures?

19           **MS. BOLLIGER:** We already actually exchanged initial  
20 disclosures, Your Honor --

21           **MR. FRIEDMAN:** Right.

22           **MS. BOLLIGER:** -- on the 15th of April.

23           **MR. FRIEDMAN:** We agreed on the date on initial  
24 disclosures, but we haven't agreed on whether or not the  
25 parties should comply with the General Order 71 for

1 disclosures in employment cases. And --

2 **THE COURT:** Well, it doesn't apply to class actions.  
3 But with respect to the individual plaintiffs, I think it  
4 would be helpful to move this case along, and you're ordered  
5 to comply with it with respect to the two individual  
6 complainants.

7 **MR. FRIEDMAN:** Thank you, Your Honor. And we were  
8 asking that the -- we been served with volumes of discovery  
9 requests. I brought them with me to the courtroom, but I  
10 don't -- I don't think you want to see them. But there's 138  
11 document requests. And I'd like to not have to respond to  
12 these until after their General Order 71 compliance.

13 And then if necessary, I'll make whatever objections, and  
14 we can litigate whether this is overly burdensome and  
15 unnecessary, but --

16 So I was asking that we not serve any written discovery --

17 **THE COURT:** Let me see them.

18 **MR. FRIEDMAN:** This is just one --

19 **THE COURT:** Is it your litigation approach to paper  
20 people?

21 **MR. FRIEDMAN:** No. Oh, sorry.

22 **MS. BOLLIGER:** Absolutely not, Your Honor. We -- we  
23 simply seek documents that pertain to each complaint  
24 allegation, and there are a lot of complaint allegations in  
25 this third amended complaint.



1           **THE COURT:** Well, this is not going to be -- and that  
2 includes everything I've already stricken?

3           **MS. BOLLIGER:** We did not include the stricken  
4 allegations, Your Honor, no. It is -- so we did not include  
5 the fifth cause of action in those discovery requests. It is  
6 just seeking documents that pertain or support the other  
7 allegations in the complaint and then routine discovery  
8 requests, like plaintiffs' medical records, to the extent they  
9 sought treatment regarding defendant's alleged conduct in the  
10 case; their employment records, if they are re-employed; those  
11 sorts of basic things.

12           But the vast majority of the requests are simply asking  
13 for documents that relate to the complaint allegations.

14           **MR. FRIEDMAN:** And these would fall under General  
15 Order 71. They're going to get most if not everything, and  
16 it's -- it's just an extra burden on us to have to respond to  
17 this. And if we want to oppose it and object to it, we ask  
18 that we do it after the -- after the General -- General Order  
19 71 exchange.

20                               (Pause in the proceedings.)

21           **MR. FRIEDMAN:** The truth is -- Your Honor, is that  
22 plaintiffs have very few documents in their possession.

23           **THE COURT:** Yeah, I would agree.

24           If this is your approach, you're going to have problems  
25 with me. Do you understand me?

1           **MS. BOLLIGER:** I understand, Your Honor.

2           **THE COURT:** All right. Give this back to him.

3                           (Off-the-record discussion.)

4           **MR. FRIEDMAN:** Connected with that, Your Honor, we  
5 were asking that the depositions not go forward until we have  
6 this (sic) exchanges.

7           **THE COURT:** Yeah, there will -- that order I believe  
8 gives you 30 days; is that right?

9           **MR. FRIEDMAN:** Yes, Your Honor.

10          **THE COURT:** All right. Productions for the two  
11 plaintiffs on both sides shall be done by May 17th. After  
12 that, revised discovery requests may be promulgated and served  
13 to the extent that those documents are not received before or  
14 as part of the General Order 71 exchange.

15          I need a fourth amended complaint on file in one week,  
16 April 29th. You're just striking things. That's all you're  
17 doing.

18          **MR. FRIEDMAN:** Yeah, I agree. I understand, Your  
19 Honor. It's only that I have a major brief due on the 2nd,  
20 and I have today a petition for rehearing due, so can you give  
21 me an extra --

22          **THE COURT:** It's not going to take you that long.

23          **MR. FRIEDMAN:** It won't.

24          **THE COURT:** You have the weekend.

25          **MR. FRIEDMAN:** Okay.

1           **THE COURT:** All you're doing is striking things.

2           **MR. FRIEDMAN:** Can you give me an extra -- one more  
3 extra week, just --

4           **THE COURT:** To strike things that I told you to  
5 strike last time? No.

6           **MR. FRIEDMAN:** Okay. Will do, Your Honor.

7           **THE COURT:** Answer to the fourth amended complaint's  
8 due a week later, May 6th.

9           No depositions until after May 17th. Make sure you're  
10 complying with the Northern California rules on  
11 professionalism in getting those things scheduled.

12           Now --

13           **MS. BOLLIGER:** Your Honor, may I ask a clarifying  
14 question?

15           **THE COURT:** Yes.

16           **MS. BOLLIGER:** When you say no depositions until  
17 after May 17th, do you mean that we may not notice any -- that  
18 we may not serve a deposition notice until after May 17th or  
19 we may not notice the deposition until a date after May 17th?

20           **THE COURT:** Let's go with the former.

21           **MS. BOLLIGER:** Okay. Thank you.

22           **THE COURT:** All right. Now your schedules are  
23 totally different.

24           **MR. FRIEDMAN:** Might we address the settlement  
25 conference, 'cause that might impact this -- what our request

1 is, at least on the rest of the scheduling.

2 **THE COURT:** Well, is there a point?

3 **MR. FRIEDMAN:** Well, yes, Your Honor. I believe that  
4 a settlement conference would be very helpful in this case. I  
5 know that we have -- we had a mediation with -- with one of  
6 the plaintiffs, but that's -- that's where we have these  
7 problems, that we would like to bring a Rule 16 motion.  
8 First, we'd like to address it here and then potentially bring  
9 a separate motion under Rule 16 addressing a specific  
10 question -- aspect of our settlement discussions, because  
11 Kaiser will only engage in settlement discussions if we agree  
12 to compromise our attorneys' fees and give them a global  
13 settlement offer that involves me negotiating against my  
14 clients.

15 And I can't do that and I won't do that.

16 And so what I have is I have a contract with my clients  
17 that they still retain the right to demand a settlement or to  
18 direct a settlement but if they do it and they waive my fees,  
19 they have to pay twice my lodestar. And that -- that just  
20 simply assigns me the right to negotiate my fees along with  
21 any damages. And it allows me to not be in conflict with my  
22 clients when I do that.

23 And I can't get Kaiser to stop doing this technique, but I  
24 do need to have the court, if possible, look at in camera my  
25 retainer terms and determine whether or not I am in conflict

1 with my clients as Kaiser contends.

2 And I don't want to continue with the case if I'm in  
3 conflict. I believe that this -- this contract provision  
4 which is in every one of my case -- client cases is --  
5 protects both my client and me from having to negotiate  
6 against ourselves when we're trying to both negotiate against  
7 the defendant.

8 And as long as Kaiser's contending that that creates a  
9 conflict, it -- it prohibits this case from going forward. So  
10 after consultation with my own ethicists, they -- she  
11 suggested to me that I ask the court to review this  
12 circumstance and determine whether or not I'm in conflict with  
13 my clients.

14 **MS. BOLLIGER:** Your Honor, I just want to correct  
15 that defendants have not represented to counsel that they  
16 believe that there's a conflict. We don't know if there's a  
17 conflict.

18 **THE COURT:** Well, you put in your statement that you  
19 thought there could be.

20 **MS. BOLLIGER:** There -- sure. There could be. I  
21 think that --

22 **THE COURT:** I've never had that in a statement  
23 before. And I've never had it because this allegation has  
24 never been raised.

25 **MS. BOLLIGER:** We've never had this come up in a

1 settlement communication either, Your Honor. We've never had  
2 a plaintiff's counsel in our combined 30 years of experience  
3 not agree or be willing to negotiate a global settlement of  
4 attorneys' fees. This is a first for us as well.

5 But I would not characterize the problem as a conflict for  
6 us anyway.

7 **THE COURT:** You used those words. You used the word  
8 "conflict."

9 **MS. BOLLIGER:** I'm sorry. I guess I'm not sure what  
10 Your Honor is referring to. In our CMC statement?

11 **THE COURT:** I believe so.

12 **MS. BOLLIGER:** We -- our -- our position in the CMC  
13 statement, Your Honor, is simply that we don't believe that a  
14 settlement conference would be fruitful at this time and  
15 that -- that we don't believe the Rule 16 motion is necessary.

16 I would characterize the issue with plaintiffs' counsel  
17 and the fee waiver as more of an obstacle to settlement than a  
18 conflict. It has been a -- an obstacle.

19 But -- but that's because defendant's position is that  
20 they wouldn't really be able to buy any peace or bring this to  
21 a resolution if plaintiffs are still insisting on being able  
22 to litigate their fee petition in a settlement.

23 We've just never settled a case that way in our combined  
24 years of experience.

25 **MR. FRIEDMAN:** Well, I think that's exactly right.

1 They don't ever allow the court to determine what reasonable  
2 fees are.

3 **MS. BOLLIGER:** I don't --

4 **MR. FRIEDMAN:** They insist on --

5 **THE COURT:** No, the problem -- well --

6 **MS. BOLLIGER:** And I don't mean just for Kaiser, Your  
7 Honor. I mean for any client. I've settled dozens and dozens  
8 of cases, and we've never -- I've never had a plaintiff's  
9 counsel take this position before:

10 **MR. FRIEDMAN:** There's more to say about what is said  
11 between the parties in the mediation and I don't want to  
12 intrude upon a mediation privilege. I know the federal courts  
13 don't recognize a mediation privilege, but we did attend this  
14 mediation while the case was pending in state court, and the  
15 state court has a stronger mediation privilege.

16 I don't need to invade any sort of communications -- the  
17 privacy of communications between me and Kaiser in the context  
18 of the mediation to make the point that I'm making or to bring  
19 the Rule 16 motion, which simply would look at whether or not  
20 we're in conflict and determine that.

21 **THE COURT:** Well, I don't know that I can stop you  
22 from bringing a motion. Bring the motion.

23 **MR. FRIEDMAN:** Okay.

24 Well --

25 **THE COURT:** But in terms of settlement, it sounds to

1 me like, especially given the nature of this case, that until  
2 this issue is resolved, there's no point in wasting the time  
3 of a magistrate judge or anyone else to have a conference.

4 **MR. FRIEDMAN:** Well, we would bring the motion -- I  
5 think both the -- the defendants and the plaintiffs here in  
6 this case have suggested that we -- we could have a -- work  
7 towards a settlement conference with a magistrate judge in --  
8 by September. And I could bring the motion in advance of that  
9 so that when we went to a settlement conference, which I  
10 believe the ADR coordinator recommended that we do in this  
11 case, and both parties are agreeing it -- in this statement to  
12 it.

13 So I -- I think that it would be advisable to have a  
14 reference -- order of reference to a magistrate judge, and  
15 I'll bring a motion before that proceeding.

16 **THE COURT:** Do you all want to go to a particular  
17 magistrate judge or off the wheel?

18 **MS. BOLLIGER:** Your Honor, Judge Beeler was involved  
19 in the -- in the *Hill* matter and resolving that, so she has  
20 some institutional knowledge of the parties, but we would be  
21 open to being assigned to any magistrate judge.

22 **MR. FRIEDMAN:** Only because that magistrate judge  
23 was -- Beeler -- proceedings in the other case ended up with  
24 an appeal on the settlement terms, so I -- I mean, what I  
25 suggest is that we -- is that I confer with counsel for Kaiser



1 and see whether we can come up with specific names.

2 **THE COURT:** Now is your opportunity. Who are you  
3 interested in? If not, I'll put you on the wheel. I don't  
4 wait around to issue my orders.

5 **MR. FRIEDMAN:** Okay, your Honor. I'd be happy to go  
6 on the wheel.

7 **THE COURT:** All right.

8 I'll refer you to a magistrate judge to have a conference  
9 completed by September -- you didn't give me -- beginning of  
10 September, end of September, middle of September.

11 **MR. FRIEDMAN:** Maybe end of September would be best.

12 **MS. BOLLIGER:** That's fine with us, Your Honor.

13 **THE COURT:** September 30th, 2019.

14 All right. Given that we've been through multiple rounds  
15 of amendments to pleadings, there are going to be no more  
16 amendments to pleadings without a court order. It is not  
17 allowed per right. You must make a motion.

18 In terms of motions for class certification -- this case  
19 will not go on forever, folks. I mean, defendants are  
20 suggesting we don't get to class certification until April of  
21 2020, and the plaintiff is -- is asking for March of 2021.  
22 That's ridiculous in my view. I'm setting trials in a year.

23 **MR. FRIEDMAN:** I understand, Your Honor. In order to  
24 handle this case, I was hoping to first focus on the  
25 individual plaintiffs and get through a settlement conference,

1 and I was suggesting in the papers that if we could come back  
2 in six months -- after the settlement conference, we could set  
3 any date after that, would be easier.

4 But if the court is going to set the dates now, then I'm  
5 looking to start my intensive class -- you know, class-wide --  
6 company-wide discovery including asking about other complaints  
7 of discrimination and the documents to support that.

8 And I imagine there's going to be fighting over it, so  
9 that's going to start in September. And I -- and before I can  
10 get my experts, I'm going to need to have responses. I'm  
11 probably going to have to litigate some discovery motions.  
12 And I would like a year of discovery before I have to disclose  
13 experts.

14 It's not unreasonable given the breadth of this case and  
15 the amount of work that we've all put into it, but that still  
16 needs to get done.

17 **THE COURT:** Well, I don't know -- again, I don't know  
18 how it is you think that your clients are entitled to -- I  
19 mean, and maybe I don't know what the nature of the evidence  
20 is but all of the complaints ever filed?

21 **MR. FRIEDMAN:** In the Northern -- Northern -- for  
22 race discrimination in the Northern District of California.  
23 That's -- in the northern region, Northern California region.  
24 Sorry.

25 **THE COURT:** What about all of the privacy issues.

1           **MR. FRIEDMAN:** Those are issues that we're going to  
2 have to deal with. And I think that in the context of the  
3 motions, that we're going to pry into whether or not those  
4 privacy objections that other African Americans have over  
5 their employment records should stop this class action from  
6 inquiring into them.

7           I mean, basically Kaiser knows what it does in response to  
8 all of the different claims of discrimination. But we don't.  
9 And every individual plaintiff should be entitled to know what  
10 Kaiser's pattern of responding to complaints are, what they  
11 know about it, what they investigate on their own.

12           So that is why some of these things require discovery and  
13 require time. And I can't get those experts until I have the  
14 documents.

15           **THE COURT:** Well, you have to have a view of what it  
16 is that exists and/or that you need.

17           This is what I'm going to do. I still -- I still think  
18 that -- you know, discovery is not a fishing expedition.

19           **MR. FRIEDMAN:** I understand.

20           **THE COURT:** And it is not clear to me that you have  
21 really formulated how it is you want to approach this. And we  
22 are not -- we're not waiting forever. So this is what I'll  
23 do. I will give you the year to file your motion. But --

24                           (Pause in the proceedings.)

25           **THE COURT:** March 31st to file the motion for class

1 cert. You are referred to Magistrate Judge Ryu for all  
2 discovery. You are ordered to have a discovery conference  
3 with her within the next 90 days.

4 At that conference, you shall outline for her the nature  
5 of the discovery that you seek or will seek, and defendants  
6 shall respond, so that she can get a head start on managing  
7 what it is you all are doing. Otherwise, it's like an amoeba.

8 I will check in on you in November. So we'll have another  
9 case management conference November 16th, 2019 at 2:00 p.m.  
10 You're required under the local rules to file an updated case  
11 management statement. Make sure that you do.

12 **MS. BOLLIGER:** Your Honor, I may be mistaken about  
13 this, but we had the impression that there may be a prior  
14 relationship between plaintiffs' counsel and Judge Ryu, that  
15 they may have been colleagues before.

16 **THE COURT:** Is that true?

17 **MR. FRIEDMAN:** That's true, Your Honor.

18 **THE COURT:** Oh, I did not know that.

19 **MS. BOLLIGER:** Thank you, Your Honor.

20 **THE COURT:** All right. Judge Hixon.

21 **MS. BOLLIGER:** Thank you, Your Honor.

22 **THE COURT:** In November, I'll give you the rest of  
23 your schedule. At least you know that that motion needs to be  
24 filed then, so you should operate under that --

25 **MR. FRIEDMAN:** Understanding. Understood.

1           **THE COURT:** Right, with that deadline.

2           **MR. FRIEDMAN:** Okay.

3           **THE COURT:** Okay.

4           If there are any arguments over the protective order, you  
5           use the Northern California district protective order.

6           Is that going to be an issue?

7           **MS. BOLLIGER:** Your Honor, our only -- our concern  
8           with the -- the model order is that it would allow the  
9           plaintiffs to review confidential documents and information  
10          that is produced in this case. And given that it is a  
11          discrimination class action, plaintiff has already indicated  
12          that they intend to seek discovery of other employees'  
13          employment records, also complaints.

14          And so our concern is that normally in these types of  
15          cases, we have a two-tiered protective order so that employees  
16          cannot be reviewing each others' private employment records  
17          and --

18          **THE COURT:** Is there any objection?

19          **MR. FRIEDMAN:** Yes, Your Honor. We have objections  
20          over the protective order that they seek in this case, that  
21          they -- that it's based on the Northern District model. And  
22          the Northern District model allows the defendants to simply  
23          say anything they want to be secret is confidential even if  
24          there's no basis in privilege, there's no basis in privacy,  
25          if -- it's all just because they don't like information coming

1 out that makes them look like they discriminate or that  
2 they're not taking the actions necessary to stop the  
3 discrimination.

4 And so what happens is -- is that as part of the process  
5 by which Kaiser suppresses the information about their  
6 discriminatory actions so as a class -- as putative class  
7 counsel, there are people calling, there are potential  
8 plaintiffs that want to come in, there are potential putative  
9 class members that want to come in. And -- and I don't want  
10 defendants to be able to stop the sharing of information that  
11 has no basis in privilege.

12 Now, if there is a basis in privacy and privilege --

13 **THE COURT:** I'm not -- look, privilege is easy to  
14 deal with.

15 **MR. FRIEDMAN:** Yes.

16 **THE COURT:** The question is individuals' privacy.  
17 And I don't know why one employee's privacy should be  
18 infringed by someone who they don't know.

19 **MR. FRIEDMAN:** There's a question as to whether or  
20 not what they ascribe as privacy rights is justi- -- justified  
21 and whether there's a actual basis. And if there is a privacy  
22 concern, there are ways that we can address them to be able to  
23 get the information necessary to litigate this case and also  
24 to expose what Kaiser is doing in terms of how they treat  
25 African Americans.

1           So I have no problem agreeing to keeping things  
2 confidential and private when there's a real basis. I just  
3 don't want that handed (sic) over the defendants to just  
4 unilaterally say this is private, when really it's not  
5 private. What it is, is it shows the statistical patterns,  
6 for example.

7           And -- or any of the reports that they make to the EEOC.  
8 They claim that all of those -- even though there's no names  
9 on them, they claim all of those are private, and there's --  
10 if there was a proprietary interest, that's something that we  
11 would have to litigate as part of a privilege.

12           But -- and I don't mind making specific issues over  
13 specific documents, either agreeing to them or litigating  
14 them. But -- but the problem with the protective order is it  
15 hands over to Kaiser the right to just simply keep secret what  
16 it doesn't want talked about. And I was hoping to address  
17 that early on rather than go through the process of --

18           **THE COURT:** Well, not only will you address the  
19 nature of discovery with Judge Hixon, but you will discuss  
20 the -- any special provisions in a protective order.

21           In the meantime, there shall not be any delay in -- in the  
22 exchange of documents under General Order 71 on the basis that  
23 you don't have a protective order.

24           And if that is the claim, then you use the Northern  
25 District one for those purposes, because all of that

1 information should not be too debatable.

2 **MR. FRIEDMAN:** Thank you, Your Honor.

3 **THE COURT:** And if you need to do it -- if you need  
4 to go to him sooner, that's fine.

5 All right. What else can we achieve today.

6 **MR. FRIEDMAN:** The other issue, Your Honor, is the  
7 related cases. We're troubled that Kaiser seems to -- doesn't  
8 want to inform the court or plaintiffs about other claims in  
9 the administrative process and in the civil courts that would  
10 be tolled by the pendency of this case.

11 It's like that they are arguing that they're allowed to  
12 mislead other people and other courts about this and it's up  
13 to --

14 **THE COURT:** I don't understand what you're saying.

15 **MR. FRIEDMAN:** Oh, sorry, Your Honor.

16 Under -- under the case law, when you have --

17 **THE COURT:** What section of the -- where was this  
18 outlined in the statement?

19 **MR. FRIEDMAN:** In the "Related Cases" section.  
20 There's a -- where there's a discussion --

21 **THE COURT:** I see it.

22 **MR. FRIEDMAN:** Sorry.

23 And what we ask is -- we ask -- I asked Kaiser if they  
24 would tell us what other related cases exist in terms of other  
25 people who have administrative claims or court claims about



1 race discrimination.

2 **THE COURT:** We're not going to do this here.

3 **MR. FRIEDMAN:** Okay.

4 **THE COURT:** This is, in fact, the -- the crux of your  
5 discovery problem.

6 **MR. FRIEDMAN:** Hmm.

7 **THE COURT:** Right? Our understanding of what a  
8 related case is -- I am not, for instance, about to relate to  
9 this case every discrimination case in the district that was  
10 filed before yours -- or anywhere else in Northern California  
11 that was filed before yours that relates to Kaiser and  
12 discrimination of African Americans. I'm not going to do it.

13 I would have -- well, I don't know how many I'd have. But  
14 that's not how we -- that's not how we understand that rule.  
15 And there's no indication that any of those individuals want  
16 to be part of this case in any event or want to be transferred  
17 or somehow want changes made to what it is they're doing.

18 So I understand that's your theory. But we are not there  
19 yet.

20 **MR. FRIEDMAN:** I misspoke, then, Your Honor. It's --  
21 it's -- and then you're absolutely correct, if that's -- if  
22 you're asking whether or not all these cases should be brought  
23 into this court, that's not what we're asking at all. At all.

24 The question has to do with -- and I've seen this in other  
25 class actions when I'm dealing with administrative

1 proceedings, and I get a letter from the -- either from the  
2 defendant or from the EEOC saying there is a pendent -- there  
3 is a class action pending that might impact your deadlines.

4 So it's just so that other people who have administrative  
5 claims are not faced with this timeliness question that  
6 doesn't exist. If they're saying, listen, you have to file  
7 your claim with the EEOC within a certain number of days or  
8 you have to file your lawsuit within a certain number of days  
9 after the right-to-sue letter, those rules actually don't  
10 apply to anybody else who has a claim against the Kaiser for  
11 race discrimination and retaliation.

12 And all I'm asking for is that we identify who has made  
13 those complaints. And we inform them that the -- or at least  
14 stop Kaiser from arguing timeliness objections in those cases,  
15 'cause otherwise, they'll -- they'll be subject to Kaiser's  
16 timeliness arguments that are frivolous but they don't know it  
17 because this case is pending.

18 **MS. BOLLIGER:** Your Honor --

19 **THE COURT:** Response?

20 **MS. BOLLIGER:** We -- we disagree with the analysis,  
21 and I think the fundamental flaw in the analysis is, in our  
22 view, that plaintiffs' position that a statute of limitations  
23 defense would be frivolous if plaintiffs have a potential  
24 tolling argument. That doesn't make the statute of limitation  
25 defense frivolous. It just means that plaintiffs have the

1 ability to argue an exception to the statute of limitations,  
2 and these things happen all the time in cases.

3 This case is a matter of public record so other plaintiffs  
4 can easily find it. And we would also point out that Rule 23  
5 provides the clear method for providing notice to putative  
6 class members. It doesn't contemplate this. Certainly the  
7 advisory committee, if they thought this kind of a notice was  
8 necessary for putative class members, they could have provided  
9 this type of notice that plaintiffs are asking for. They did  
10 not.

11 And so our position is that this is just not necessary.

12 **THE COURT:** It is --

13 (Simultaneous colloquy.)

14 **THE COURT:** -- almost that request for a  
15 pre-notice -- precertification notice, and there is no class  
16 yet.

17 **MR. FRIEDMAN:** That's right, Your Honor. We're not  
18 asking for class notice per Rule 23. Most definitely, we're  
19 not there yet.

20 **THE COURT:** But that's in effect what you're asking  
21 for.

22 **MR. FRIEDMAN:** No, what we're asking for, Your  
23 Honor --

24 Sorry. What we're asking for is that -- it has -- it's  
25 not about notification of a class certification motion or a

1 certified class. What it is, is it's notification -- it's --  
2 it's stopping Kaiser from making -- from telling those other  
3 parties that --

4 **THE COURT:** If --

5 **MR. FRIEDMAN:** -- their claims are late. So it's  
6 about -- it's about figuring out which cases have tolled  
7 statute of limitations and -- and acting appropriately on  
8 that.

9 **THE COURT:** Mr. Friedman, I -- frankly, I don't know  
10 where you're coming from.

11 **MR. FRIEDMAN:** Okay.

12 **THE COURT:** So if you want me to issue an order,  
13 especially given that I don't know what the basis is of your  
14 order (sic), and I don't know specifically what you are asking  
15 me to order --

16 **MR. FRIEDMAN:** Um-hmm.

17 **THE COURT:** -- make a motion.

18 **MR. FRIEDMAN:** Make a motion.

19 **THE COURT:** And lay out your authority, because it  
20 just --

21 **MR. FRIEDMAN:** That makes sense, Your Honor.

22 **THE COURT:** Yeah, I just don't -- I don't see how  
23 that operates in the framework of rules in an instance where  
24 right now, you represent two individuals and you may one day  
25 represent more but you don't yet.

1           **MR. FRIEDMAN:** I appreciate all of that, Your Honor.

2           **THE COURT:** Okay.

3           Anything else?

4           **MS. BOLLIGER:** Not from defendants, Your Honor.

5           Thank you.

6           **MR. FRIEDMAN:** No, thank you.

7           **THE COURT:** All right. Have a good day. We're  
8           adjourned.

9           **MS. BOLLIGER:** Thank you, Your Honor.

10          **MR. FRIEDMAN:** Thank you, Your Honor.

11          (Proceedings were concluded at 3:04 P.M.)

12                           --o0o--

13  
14                           **CERTIFICATE OF REPORTER**

15  
16           I certify that the foregoing is a correct transcript  
17           from the record of proceedings in the above-entitled matter.  
18           I further certify that I am neither counsel for, related to,  
19           nor employed by any of the parties to the action in which this  
20           hearing was taken, and further that I am not financially nor  
21           otherwise interested in the outcome of the action.

22  
23                           

24           Raynee H. Mercado, CSR, RMR, CRR, FCRR, CCRR

25                           Tuesday, June 4, 2019